SEP 10 2001

Supreme Court, U.S.
FILED
SEP 10 2001

No. 00-1307

In the Supreme Court of the United States

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

SIGMON COAL COMPANY, INC., AND JERICOL MINING, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

		Page
1.	Anomalies in respondents' construction of the Coal Act	2
2.	The text of the Coal Act	8
3.	Background principles of successorship	13
4.	Deference to the Commissioner	17

TABLE OF AUTHORITIES

Cases:

Allegheny Pittsburgh Coal Co. v. *County Comm'n*, 488 U.S. 336 (1989)	4
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)	17
Dixie Fuel Co. v. *Commissioner*, 171 F.3d 1052 (6th Cir. 1999)	6
Eastern Enters. v. *Chater*, 110 F.3d 150 (1st Cir. 1997), rev'd on other grounds, 524 U.S. 498 (1998)	11
Fall River Dyeing & Finishing Corp. v. *NLRB*, 482 U.S. 27 (1987)	13, 17
Field v. *Mans*, 516 U.S. 59 (1995)	11
Holland v. *William Mountain Coal Co.*, 256 F.3d 819 (D.C. Cir. 2001)	16, 17
Johnson v. *United States*, 529 U.S. 694 (2000)	13
Martin v. *Hadix*, 527 U.S. 343 (1999)	11
Nordlinger v. *Hahn*, 505 U.S. 1 (1992)	4
Smiley v. *Citibank, N.A.*, 517 U.S. 735 (1996)	19
Sullivan v. *Finkelstein*, 496 U.S. 617 (1990)	12
United States v. *Mead Corp.*, 121 S. Ct. 2164 (2001)	17, 18, 19

Statutes:

Black Lung Benefits Act, Pub. L. No. 91-173, 83 Stat. 792 (30 U.S.C. 901 *et seq.*)	15

Statutes—Continued: Page

30 U.S.C. 932(c) 15
30 U.S.C. 932(i) 15
30 U.S.C. 932(j)(2) 15
Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*:
26 U.S.C. 9701(c)(2)(A) 5, 8, 9, 10, 11, 13, 17, 18
26 U.S.C. 9701(c)(2)(A)(i)-(iii) 10
26 U.S.C. 9701(c)(2)(B) 1, 16
26 U.S.C. 9701(f) 15
26 U.S.C. 9702 ..... 11, 12
26 U.S.C. 9704(a) 10
26 U.S.C. 9704(d) 10
26 U.S.C. 9705(b) 10
26 U.S.C. 9706(a) 10
26 U.S.C. 9706(b)(2) 9, 10
26 U.S.C. 9706(f)(1) 6, 18
26 U.S.C. 9706(f)(3)(A)(i) and (ii) 19
26 U.S.C. 9711 11
26 U.S.C. 9711(g)(1) 1, 11, 16
26 U.S.C. 9711(g)(2) 12
26 U.S.C. 9712 (Subch. C) 11
Energy Policy Act of 1992, Pub. L. No. 102-486, § 19142, 106 Stat. 3037 20
5 U.S.C. 554(a) 19
26 U.S.C. 4121 15
26 U.S.C. 9501 15

Miscellaneous:

Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate Comm. on Finance, 102d Cong., 1st Sess. (1991) 4-5, 14
Coal Industry Retiree Health Benefit Act of 1992: Hearings Before the Subcomm. on Oversight of the House Ways and Means Comm., 104th Cong., 1st Sess. (1995) 19

Miscellaneous—Continued: Page

138 Cong. Rec. (1992):
pp. 20,117-20,122 12
pp. 20,161-20,167 12
p. 34,002 3
Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Comm. on Ways and Means, 103d Cong., 1st Sess. (1993) 18

In the Supreme Court of the United States

No. 00-1307

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

SIGMON COAL COMPANY, INC., AND JERICOL MINING, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents maintain that, under the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), a direct successor in interest of a signatory operator that employed a retired miner may not be held responsible for that miner's health-care costs. Respondents acknowledge (Br. 22) that, under the Coal Act, if a signatory operator that employed beneficiaries of the United Mine Workers of America Combined Benefit Fund (Combined Fund) is no longer in business, the Commissioner of Social Security may assign responsibility for the health-care costs of those beneficiaries to the successor in interest *of a related person* to the operator. See 26 U.S.C. 9701(c)(2)(B). They also acknowledge (Br. 22) that, if a signatory operator that employed beneficiaries of an individual employer plan (IEP) or the 1992 United Mine Workers of America Benefit Plan (1992 Plan) is no longer in business, the Commissioner may assign responsibility for those beneficiaries to the direct successor in interest of the operator *or* a successor in interest of a related person to the operator. 26 U.S.C. 9711(g)(1). Yet

they contend that Congress specifically intended the anomalous result that the direct successor in interest of a signatory operator that actually employed beneficiaries of the Combined Fund could not be made responsible for those beneficiaries.

Respondents' construction should be rejected for several reasons. First, respondents cannot avoid the anomalous results of their construction, and absent from their submission is any plausible reason why Congress would have wanted to draw such strange distinctions. Second, the text of the Coal Act does not compel respondents' construction and in fact supports the Commissioner's construction. Third, background principles of successorship law are contrary to respondents' position. Finally, to the extent the Coal Act is unclear, the Court should give deference to the Commissioner's construction of the Act.

1. *Anomalies in Respondents' Construction of the Coal Act*

a. Respondents' principal contention (Br. 39-43) is that the Coal Act was the product of hard-fought legislative compromise. They speculate that inclusion of successors in interest of signatory operators among those liable to the Combined Fund might have been resisted by affected interest groups. Respondents identify nothing in the legislative background to indicate that the liability of direct successors of signatory operators was controversial, or indeed that it was ever specifically opposed by anyone during the legislative process. Moreover, the only legislative history on the specific issue of direct-successor liability supports such liability. Gov't Br. 28-29. Senator Wallop, one of the Coal Act's sponsors and a leading figure in bringing the Act to final passage, explained that, because of "complex corporate structures which are often found in the coal industry," the conferees had accepted the Senate's provision for "related person" responsibility for retirees' benefits; thus, "the term

'related person' [in the Coal Act] is defined broadly to include companies related to the signatory operator," specifically including "successors to the collective bargaining agreements of a signatory operator." 138 Cong. Rec. 34,002 (1992).[1]

b. Respondents suggest (Br. 46-48) that Congress might have decided to make successors of related persons, but not direct successors, potentially liable to the Combined Fund because direct successors shared the interests of coal operators and were protected by coal companies in the legislative process. Respondents then speculate that related persons and their successors, which might have been engaged in broader range of economic pursuits (such as operating Coca-Cola bottling plants), were innocent bystanders to the legislative process and were an easy target for inclusion in the Coal Act's liability scheme. Respondents put forward nothing other than conjecture, however, to suggest that related persons as a class were not also engaged in coal mining and therefore would have had no interest in limiting liability for themselves and their successors as well.

---

[1] Respondents argue (Br. 27-28) that Senator Wallop's statement is not entitled to weight because it might have been aimed at "reclaiming that which was yielded in the actual drafting compromise." Nothing in the background of the Coal Act suggests, however, that any interest group was particularly focused on the question of direct-successor liability. Moreover, the prior version of the legislation (which was vetoed by the President for unrelated reasons) expressly made direct successors potentially liable for signatory operators' beneficiaries, and the version of the Coal Act that was eventually enacted (which abandoned taxes as a mechanism to finance the health-care costs of orphan retirees) was *broader* than the predecessor in reaching entities that were connected to the original signatory operator. Gov't Br. 33-34 n.11; see 138 Cong. Rec. at 34,001 (technical explanation by Sen. Wallop) (noting that "[b]roadening the definition of responsible operator * * * is the essence of the Conference Agreement").

In any event, the Court should reject respondents' view of an Act of Congress as nothing more than a codification of private interests. This Court has always adhered to the presumption that, even where (as here) distinctions in a purely economic statute need meet only a standard of rationality, those distinctions ordinarily are expected to advance some real and legitimate object of legislative policy. See *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336, 345-346 (1989); see also *Nordlinger* v. *Hahn*, 505 U.S. 1, 11 (1992) ("plausible policy reason for the classification"). Beyond hazarding that some private interests were "in" and some were "out" in the legislative process, respondents advance no justification *in the policy of the Coal Act* for making successors of related persons of signatory operators liable but completely exempting direct successors of the signatory operators themselves.

c. Congress was aware that, under the imperiled system in existence before 1992 for financing retirees' health-care benefits, the diminishing number of operators remaining in that system were being forced to shoulder the burden of benefits for employees of signatory operators that had left the system. See Gov't Br. 32-34. Congress had before it two proposals for broadening the fiscal base for financing the health benefits of those retirees and their dependents. One proposal was the "industry-wide" solution of a tax on future bituminous coal production and importation. That proposal, although supported by some members of the Coal Commission, was criticized by others because it would have reached entities that had no connection to the system of collective bargaining associated with the National Bituminous Coal Wage Agreement (NBCWA), and it was rejected by the President. See Gov't Br. 4-5; *Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate*

Comm. on Finance, 102d Cong., 1st Sess. 57-58, 60-61, 71-72, 77 (1991) (*1991 Senate Hearing*).

The second approach, which eventually took shape as the Coal Act, was to reach those signatory operators that had withdrawn from the NBCWA system, as well as other entities that had a sufficient nexus to those operators through some relationship—such as "related person" status and/or successorship—to be deemed responsible for the benefits of retired miners who had been employed by those operators. That second approach provided a significant benefit to operators that had remained in the pre-1992 system, because it ensured that the funding base would be significantly broadened. Although the class of successors might include some of the signatory operators that had remained in the pre-1992 NBCWA system in their own right and who purchased the mining operations of other operators, it also necessarily included a broad range of other entities that had withdrawn from, or had not previously been included in, the funding base for retirees' benefits.

Furthermore, Congress plainly perceived that it would have been insufficient to make only signatory operators and their related persons, but not any of their successors in interest, potentially responsible for retirees' benefits, for it indisputably made successors in interest of related persons potentially liable to the Fund. See 26 U.S.C. 9701(c)(2)(A) (final paragraph). Signatory operators likely recognized that the urgent need for a solution to the crisis in retired miners' health-care financing, which had already led to a long and bitter strike against the Pittston Coal Company (see Gov't Br. 3), required their acquiescence in direct-successor liability.

d. Respondents and their amici make several additional policy-based arguments against successor liability, but all of those arguments fail to explain why Congress would have made successors in interest of related persons, but not direct

successors in interest of the signatory operators themselves, responsible for retirees' benefits. For example, respondents argue (Br. 43-44) that Congress might have hesitated to impose on the Social Security Administration (SSA) the task of tracing successorship relations in the coal industry.[2] But Congress plainly required the Commissioner to make assignments to related persons and to successors in interest of related persons of signatory operators, if necessary. There is no reason to believe that the task of identifying direct successors of signatory operators is any more difficult than the task of identifying related persons of the operators and then the successors of those related persons. Moreover, as Congress anticipated, pertinent information about successorship was provided to SSA during the process of administrative review of Coal Act assignments. After SSA made initial assignments to signatory operators, those operators were entitled to request from SSA detailed information about the work history of the beneficiary and the basis of the assignment. 26 U.S.C. 9706(f)(1). That information enabled operators to demonstrate to SSA that the assignment was more properly made to other entities, including successors.[3]

---

[2] Respondent relies (Br. 45 n.28) on remarks by Vice Chairman Perritt of the Coal Commission, who preferred financing through an industry-wide tax rather than an administrative mechanism of assigning individual retirees to particular operators in part because of the greater simplicity of a tax system. Congress nevertheless rejected tax financing for other reasons, and concluded that it was more appropriate to assign responsibility for individual miners' benefits to particular entities. See pp. 4-5, *supra*. The Vice Chairman's comments make clear, moreover, that Congress was aware that the latter approach would require significantly more administrative resources than a tax system, and yet it nonetheless chose such a system of assigning individual employees to particular entities.

[3] Respondents cite (Br. 44) *Dixie Fuel Co.* v. *Commissioner*, 171 F.3d 1052 (6th Cir. 1999), to argue that any initial assignment decisions made after September 30, 1993, are invalid. We disagree with that decision and are currently taking a contrary position in other circuits. See *Holland* v. *Pardee Coal Co.*, No. 00-1770 (4th Cir. argued Jan. 25, 2001); *Shenango, Inc.* v. *Massanari*, No. 00-2525 (3d Cir. to be argued Sept. 19, 2001).

Respondents also suggest (Br. 33) that Congress might have eschewed successorship liability because it intended to confine liability to the economic units (including related persons) that most directly benefitted from the retired miners' labor. That argument is plainly insufficient to support respondents' position, because Congress inarguably made successors of related persons potentially responsible for retired miners' benefits, and there is no reason to believe that those entities are more often a part of the "economic unit" that directly benefitted from the retirees' labor than are successors of the signatory operators. In any event, a direct successor of a signatory operator *does* benefit from the labor provided by that operator's former employees; the business that a direct successor purchases from a signatory operator is valuable in part because of that past labor. In addition, Congress recognized that mine operators benefit from the expectation of current employees, not only that they themselves would receive health-care benefits, but also that their retired colleagues would do so. The strike at Pittston Coal Company that led to passage of the Coal Act (see Gov't Br. 3) showed that current employees would strike over retired employees' health-care benefits. An expectation that an employer would honor promises to already-retired union members thus fostered labor peace and inured directly to the benefit of the current employer.[4]

---

[4] Respondents were sensitive to that very point when they acquired Shackleford's coal mining assets. When Irdell Mining, Inc. (later Sigmon), acquired Shackleford's assets, it also assumed Shackleford's name and its obligations under the existing collective-bargaining agreement. Gov't Br. 11. As James Sigmon, the president and majority owner of Irdell, explained, Shackleford was well known and respected in the community, but Irdell was not so well known: Shackleford "knew the coal reserves, the market, *and the Union* and we didn't." C.A. App. 211 (Sigmon affidavit) (emphasis added).

Amicus Bellaire argues (Br. 19) that Congress might have considered entities that purchased substantial coal assets from signatory operators to be "too remote" from the beneficiary to include within the Coal Act's framework. Bellaire fails to explain, however, why Congress would not have perceived that successors that had purchased non-coal assets from "related persons" even more remote from the beneficiary, and yet Congress made those entities potentially liable for retirees' benefits. Amicus USX argues (Br. 7, 21-23) that successorship liability raises difficult questions of policy and administration, but all those questions are equally raised by the liability of successors in interest of related persons to the Combined Fund, which (all agree) the Coal Act expressly authorizes. In short, these arguments are not so much challenges to the Commissioner's reading of the Coal Act as they are challenges to the wisdom of Congress's decision to authorize successorship liability at all. Such arguments belong in Congress rather than in this Court.

2. *The Text of the Coal Act*

a. We explained in our opening brief (at 23-26) that, under a straightforward reading of Section 9701(c)(2)(A), a direct successor in interest of a signatory operator may be assigned responsibility for the operator's retired employees. The last sentence of that Section provides that the term "related person" "includes" a "successor in interest" of "any person described in" its three enumerated clauses. The persons "described in" each of those enumerated clauses expressly include the signatory operator itself. Those clauses also all "describe" families of businesses that are considered related to one another by some common ownership or control, and include the signatory operator within the family. See Gov't Br. 24.

b. Respondents and their amici argue that the Commissioner's reading of 26 U.S.C. 9701(c)(2)(A) to include direct-successor liability is inconsistent with 26 U.S.C.

9706(b)(2), which permits signatory operators, at their option, to transfer their Coal Act responsibility for retirees' benefits to successors (subject to the signatory operator's remaining a guarantor of that obligation). Thus, amicus USX argues (Br. 20-21) that, by providing for optional direct-successor liability when a signatory operator's assets are sold after enactment of the Coal Act, Section 9706(b)(2) establishes a "complete scheme for preserving Coal Act liability in the context of post-enactment transactions," and so no additional, mandatory direct-successor liability is necessary or appropriate. See also Resp. Br. 30. For three reasons, that reliance on Section 9706(b)(2) is misplaced.

First, Section 9706(b)(2) addresses only transactions that occur after enactment of the Coal Act in 1992, not transactions, such as Jericol's acquisition of Shackleford in this case, which occurred in 1973. Second, it is not the case that Section 9706(b)(2) by itself ensures that, even in post-Act successorship situations, some entity will necessarily be responsible for each retiree's benefits. That argument fails to account for the situation in which, after enactment of the Coal Act, a signatory operator for legitimate business reasons sells substantially all of its assets to another entity, and then dissolves and distributes the proceeds of the sale to its shareholders, without making any provision for the successor entity to be responsible for its retirees' benefits. In such a case, if the operator's direct successor could not be made responsible for the retirees' benefits under Section 9701(c)(2)(A), and if there were no other "related person" available, then financial responsibility for the retirees' benefits would have to fall elsewhere as provided under the Coal Act—either to an entity in a lower tier under 26 U.S.C. 9706(a), if such existed, or on the public and other operators *pro rata*, under 26 U.S.C. 9704(d) and 9705(b). See Gov't Br. 6-8. That result is inconsistent with Congress's purpose of ensuring that retirees' health-care costs be borne, if possible,

by entities with the most direct responsibility for the beneficiary, and not by more remote signatory operators, or by the public fisc. See *id.* at 28.

Third, the argument based on Section 9706(b)(2) fails to apprehend that the effect of a contractual assignment of a signatory operator's liability to a direct successor under Section 9706(b)(2) is simply to provide that the direct successor will be responsible for a particular retiree's health-care costs in the first instance. If the direct successor does not pay that premium, then the original assigned operator may be required to pay it, as a guarantor. See 26 U.S.C. 9706(b)(2). And if the original assigned operator no longer exists or cannot pay, any related person may be jointly and severally liable for the operator's obligation. See 26 U.S.C. 9704(a). This mechanism of private ordering, which makes the direct successor the first entity to be responsible for premiums to the Combined Fund, stands in contrast to Section 9701(c)(2)(A). Under that provision, as administered by the Commissioner (Pet. App. 83a-94a), a successor in interest is assigned responsibility for a signatory operator's employees only if the signatory operator itself is not in business and if no "related person" meeting the criteria of the three paragraphs of Section 9701(c)(2)(A)(i)-(iii) can be found. The private ordering permitted by Section 9706(b)(2) thus supplements the Commissioner's authority to make assignments to direct successors in interest, but it does not supplant that authority.[5]

[5] This point explains why amicus R.G. Johnson errs in arguing (Br. 4-5) that the Commissioner's reading of the Coal Act at issue in this case conflicts with the Commissioner's construction that was at issue in *Eastern Enterprises* v. *Chater*, 110 F.3d 150 (1st Cir. 1997), rev'd on other grounds, 524 U.S. 498 (1998). In *Eastern*, the issue of statutory interpretation before the court of appeals was whether the Commissioner could assign responsibility for a signatory operator's retirees to the operator *rather than* assigning the retirees to a direct successor of the operator, when both remained in existence. The court of appeals agreed with the Commissioner that it was appropriate to assign responsibility to the operator rather than its successor. 110 F.3d at 154-155. While the government's brief in the district court in that case stated that "[t]he Coal Act's assignment hierarchy plainly does not require assignments to successor companies," see R.G. Johnson Amicus Br. 2a, that statement must be understood in the particular context in which it was made. Moreover, that brief explained that, under SSA's policy and reading of the Act, direct-successor assignments *can* be made, but if and only if the signatory operator and all other related persons are no longer in business. See *id.* at 5a-7a.

c. Respondents also argue (Br. 22) that the Commissioner's reading of Section 9701(c)(2)(A) cannot be reconciled with 26 U.S.C. 9711(g)(1), which states that, for purposes of Subchapter C of the Coal Act (26 U.S.C. 9711 and 9712), "[t]he term 'last signatory operator' shall include a successor in interest of such operator." Subchapter C of the Coal Act, however, governs only IEPs and the 1992 Plan, and not the Combined Fund (which is treated in Subchapter B). Its relevance for assignments of miners who are beneficiaries of the Combined Fund is therefore minimal. Accordingly, no negative inference can reliably be drawn from the fact that Congress did not include the same language in Subchapter B. Cf. *Martin* v. *Hadix*, 527 U.S. 343, 356 (1999). Moreover, an argument based on a negative inference should be rejected where, as here, it would lead to results at which "common sense would balk." *Field* v. *Mans*, 516 U.S. 59, 68 (1995).

In any event, there may have been good reason for Congress not to include language similar to that in Section 9711(g)(2) in the Coal Act's provisions governing the Combined Fund. Section 9711(g)(2) in effect *defines* a signatory operator to include a successor in interest. Congress might have decided not to include that specific language in Subchapter B because it might have suggested that, when the signatory operator was no longer in business, the operator's

direct successor should be assigned responsibility for a retiree's benefits *before* another "related person." Congress might have rejected such an approach for entities responsible to the Combined Fund based on the perception that it would be more fair to make related persons of the operator responsible before direct successors. On the other hand, for successorship transactions involving operators that are liable to the 1992 Plan, which by definition occur after the Coal Act became law, the same fairness argument would not have been persuasive, as direct successors were on notice that they would succeed to obligations to the 1992 Plan.[6]

While it is impossible to reconstruct all the various policy considerations that Congress might have considered in fashioning the Coal Act's provisions for responsibility to the

[6] Respondents also note (Br. 28 n.15) that, a few days before the Coal Act was passed, Senate Legislative Counsel circulated a draft bill that, in similar fashion, would have expressly defined a "signatory operator" to include any successor of such an operator, if the operator was no longer in business. That definition would have applied to what became Subchapter B of the Coal Act. See R.G. Johnson Amicus Br. 13a-15a. That provision did not appear in the Coal Act as eventually enacted. Such unendorsed staff materials are generally entitled to little consideration in interpreting a statute. Cf. *Sullivan* v. *Finkelstein*, 496 U.S. 617, 628 n.8 (1990). In any event, Congress's failure to adopt the language in the draft bill put forward by Senate Legislative Counsel sheds little light on the matter in question. By the time that draft bill was circulated, the Senate had already passed a version of legislation concerning retirees' health-care benefits, which addressed related-person and successorship liability. See 138 Cong. Rec. at 20,117-20,122, 20,161-20,167. There was no competing bill from the House of Representatives comprehensively addressing the issue of retirees' health-care benefits. The House-Senate conference accepted the Senate language without change. See Gov't Br. 28 n.9. The conferees may well have concluded that the language in the Senate-passed bill was sufficiently clear to resolve the matter, or they may have decided not to reopen the Senate language for other reasons; but in any event, this is not a situation in which Congress deliberately rejected one proposal and chose another instead.

Combined Fund, what is certain is that respondents and their amici have identified *no* policy reason for Congress to have made successors in interest of related persons liable to the Combined Fund but to have exempted direct successors in interest of signatory operators. Whether one understands this case as involving a situation where the text of the statute may and should be construed to effectuate a sensible understanding of a clear legislative policy, see *Johnson* v. *United States*, 529 U.S. 694, 706-707 n.9 (2000), or (as Judge Murnaghan suggested in dissent below, see Pet. App. 39a-44a) the rare case where the literal text of the statute does not control because it would "produce a result demonstrably at odds with the intentions of its drafters," the Commissioner's construction of Section 9701(c)(2)(A) as encompassing direct-successor liability should be upheld because it "enjoys the virtue of serving the evident congressional purpose" (*Johnson*, 529 U.S. at 708) in enacting the Coal Act.

3. *Background Principles of Successorship*

Respondents argue (Br. 29) that background principles of successorship liability do not support the Commissioner's construction of the Coal Act because, they maintain, those principles employ a "balancing test in which a critical question is whether the successor had notice of the liability or claim against the predecessor." Respondents fail to discuss or even cite a body of case law that Congress would have found highly relevant, this Court's decisions under the National Labor Relations Act (NLRA), including *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987), which endorsed a broad approach to successorship under the NLRA. In that case, the Court determined that an employer that succeeds to a predecessor by purchasing its assets (not just through merger or consolidation, see *id.* at 31-32, 43-44 & n.10) is obligated to bargain in good faith with the union that represented the predecessor's employees. The Court emphasized that the policy of labor law protecting

the employees' right to choose a bargaining representative should not be "subject to the vagaries of an enterprise's transformation." *Id.* at 40.

So too in the Coal Act, Congress has unmistakably followed a policy of protecting retired miners from the vagaries of corporate transformation. As the Vice Chairman of the Commission explained at the Senate hearing on the Coal Act, the shifting of corporate forms was a critical factor in the inability of the pre-1992 system for retirees' health benefits to marshal a sufficient funding base:

> [B]ased on everything that the Commission learned about the practices in the industry, this is an industry in which it is common to have a variety of business association forms with respect to operations to a particular physical mine, and for those forms of business association to change over time. This is so whether it be joint ventures, whether it be subsidiaries that are here today and gone tomorrow, whether it be subsidiaries that are thinly capitalized and turn out to be undercapitalized and so they are gone.

1991 Senate Hearing 15; see Gov't Br. 4-5. Congress acted to protect retirees' health-care benefits from the danger that the entity that had employed the miners and was most directly responsible for financing those benefits would be "here today and gone tomorrow." Indeed, in the Coal Act, Congress went even further than the National Labor Relations Board and this Court had gone in *Fall River*, for it permitted the Commissioner to assign responsibility for an operator's employees not only to its direct successors in interest, but also to its related persons (and their successors), using a deliberately broad definition of "related person." See Gov't Br. 33-34 n.11 (explaining how Congress broadened definition of "related person" from prior version of legislation, to reach entities with only 50% common stock

ownership). Congress thus demonstrated its intent that the Commissioner should not treat the corporate veil as an iron curtain. It would be inconsistent with that statutory policy to graft onto the Coal Act a conception of successor liability even narrower than that adopted in similar labor and benefits statutes (see Resp. Br. 31-32).[7]

Respondents argue (Br. 29) that Congress did not intend to look to background principles of successorship because successorship liability often turns on whether the successor had actual notice of the predecessor's obligation. Plainly, however, Congress did not consider such notice of be essential to successorship liability under the Coal Act, because Congress explicitly made successors of related persons of signatory operators potentially liable for the operator's retirees, even if that relationship arose before enactment of the Coal Act. See 26 U.S.C. 9701(c)(2)(B) (providing that relationships are to be determined as of July 20, 1992).

---

[7] Respondents argue (Br. 31-32) that, had Congress intended to make successors of signatory operators responsible to the Combined Fund for the health-care benefits of the operators' retired employees, it could have followed the approach of the Black Lung Benefits Act, Pub. L. No. 91-173, 83 Stat. 792, as amended, which expressly makes certain successors of operators liable for miners' black-lung benefits. See 30 U.S.C. 932(i). The black-lung benefits program is of little relevance here, for two reasons. First, under that program, Congress imposed liability on successors *only* when the successorship relationship was created on or after the effective date of the original act. See *ibid.* The Coal Act, by contrast, indisputably applies in the case of at least some successorship relationships created before the Act was passed—namely, those involving successors of interest of related persons. Second, Congress has, since 1978, exempted even original operators from liability for black-lung benefits for miners who left employment before the original act was passed in 1969. See 30 U.S.C. 932(c). Rather, most such benefits are paid out of the Black Lung Disability Trust Fund, which is financed in part by a tax on coal production. See 30 U.S.C. 932(j)(2); 26 U.S.C. 9501; 26 U.S.C. 4121. The Coal Act, however, is based on a congressional determination *not* to rely on public funds for the financing of miners' benefits. See Gov't Br. 5.

Successors to related persons obviously could not have had notice of the obligations that would later be imposed under the Coal Act, and they might also have been unaware of the original operators' obligations under collective-bargaining agreements. A direct successor, by contrast, would ordinarily have had notice of the original operator's collective-bargaining obligations, and respondents voluntarily assumed those obligations. See J.A. 23, 26.[8]

[8] Respondents and their amici also argue that the Commissioner's criteria for the identification of successors (Pet. App. 86a-87a) go beyond the statute, even insofar as it authorizes liability for a successor in interest of a related person. See Resp. Br. 15 n.11; USX Br. 10-11. As respondents properly acknowledge, see Br. 15 n.11, that question is not before the Court. That issue is not included within the question presented by the certiorari petition. The court of appeals expressly declined to address that issue, and assumed for purposes of its decision that respondent Jericol is a successor in interest, within the meaning of the Coal Act, to Shackleford. See Pet. App. 23a-24a n.5.

Respondents also rely (Supp. Br. 1-4) on the D.C. Circuit's recent decision in *Holland* v. *Williams Mountain Coal Co.*, 256 F.3d 819 (2001), which rejected the argument by the Trustees of the 1992 Plan that a coal company that had purchased the coal mining assets of another company was a "successor in interest" of the original operator under 26 U.S.C. 9711(g)(1). That Section defines a signatory operator to include a successor in interest of that operator, for purposes of the 1992 Plan. See pp. 11-12, *supra*. The Commissioner has no administrative role in implementing of the 1992 Plan, and thus has had no occasion to construe Section 9711(g)(1), and also did not participate in the *Williams Mountain* case. To the extent the D.C. Circuit might have concluded in that decision that the term "successor in interest," wherever it appears in the Coal Act, necessarily means only an entity that succeeds to the tax attributes of the predecessor entity (see 256 F.3d at 823, 825), we disagree. We note, however, that it is questionable whether the companies involved in *Williams Mountain* would have been successors in interest even under the Commissioner's interpretation of that term as used in Section 9701(c)(2)(A), because those companies never employed any of the miners employed by the predecessor firm. See 256 F.3d at 820. Under the Commissioner's construction, a company may be a successor in interest of a signatory operator only if, among other things, it "uses many of the same employees who worked for the former owner," Pet. App. 86a, a condition that parallels successorship principles under the NLRA. See *Fall River*, 482 U.S. at 41.

4. *Deference to the Commissioner*

Respondents argue (Br. 35-37) that the Commissioner's interpretation of the Coal Act to include direct-successor liability is not entitled to deference. Respondents argue that the Commissioner's administration of the Coal Act is purely ministerial and does not require him to make any legal determinations. That contention is incorrect.

First, even respondents acknowledge that not all the relevant terms of the Coal Act that fix entities' responsibility to the Combined Fund are self-defining. For example, the Coal Act plainly contemplates that the Commissioner may assign responsibility for a retiree to a successor in interest of a related person of a signatory operator. See 26 U.S.C. 9701(c)(2)(A). As respondents point out (Br. 15 n.11), however, courts have adopted a number of approaches to the liability of successors in interest. Congress did not define that term in the Coal Act. Because Congress knew that the Commissioner would have to give content to that concept in making assignments under the Coal Act, it necessarily "left a gap for the agency to fill." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984); see also *United States* v. *Mead Corp*, 121 S. Ct. 2164, 2171-2172 (2001) (even absent express delegation of law-making authority to the agency, "the agency's generally conferred authority" may make clear that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law"). Similarly, while the Coal Act does expressly "include" certain entities within the reach of "related person," see 26 U.S.C. 9701(c)(2)(A), it does not expressly *define*

that term to *exclude* direct successors in interest, and thus it leaves to the Commissioner the authority to make a reasonable determination that direct successors in interest are within the category of related persons. See Gov't Br. 41-42.[9]

Second, unlike the Customs Service letter-ruling system that the Court examined in *Mead*, the Commissioner's process for assignment of retirees to operators under the Coal Act is, by statute, "a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement" with the force of law. *Mead*, 121 S. Ct. at 2172. After the Commissioner assigns a beneficiary to an operator, that assigned operator has the right to further administrative review of the assignment decision and to obtain from SSA "detailed information as to the work history of the beneficiary and the basis of the assignment" in order to challenge the assignment. 26 U.S.C. 9706(f)(1). If the Commissioner "determines," based on the administrative review, that "an assignment was in error," he "shall notify the assigned operator" and the Combined Fund of the error, and he "shall review the beneficiary's record for reassignment." 26 U.S.C. 9706(f)(3)(A)(i) and (ii). Thus, while the Coal Act does not require "on the record" adjudica-

[9] Respondents rely (Br. 35-36 n.20) on a 1993 statement by then-Acting Commissioner Lawrence H. Thompson, to the effect that SSA had "no discretion" as to the way it applied the criteria for operator liability under the Coal Act. In context, however, it is clear that he was referring to the Coal Act's three-tier system for assignment of liability to operators, and in particular the dates and durations of a miner's employment. See *Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Comm. on Ways and Means*, 103d Cong., 1st Sess. 21-22 (1993). In addition, Acting Commissioner Thompson explained that, under the Coal Act, responsibility for a signatory operator's employees could pass to the operator's successor. See *id.* at 24-25. Mr. Thompson's statement is therefore entirely consistent with our submission here.

tion for assignments, cf. 5 U.S.C. 554(a), it does provide a centralized administrative mechanism for SSA formally to consider evidence and legal arguments in support of claims of error in assignments. See J.A. 51-66 (respondents' administrative-appeal letter in this case).

Even if full *Chevron* deference is not applicable here, the courts should give at least "some deference" to the Commissioner's application of the Coal Act, given the "specialized experience and broader investigations and information available to the agency." See *Mead*, 121 S. Ct. at 2175 (internal quotation marks omitted). The Commissioner's final program instructions for implementation of the Coal Act reflect lessons learned from review of the histories of hundreds of signatory operators that employed thousands of miners. See *Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 104th Cong., 1st Sess. 23-24, 27 (1995) (statement of Principal Deputy Commissioner Lawrence H. Thompson).[10] Those lessons include confirmation of what Senator Wallop and Members of the Coal Commission observed—namely, that the coal industry was marked by constantly shifting corporate forms, and that if the concept of "related person" were not construed broadly, then financial responsibility for many retired miners would be foisted on the public, or on other signatory operators that had had

[10] Respondent objects (Br. 36 n.21) that SSA had previously followed a more restrictive approach to the concept of successorship liability. As this Court has made clear, to the extent that an agency has discretion in interpreting a statute, it also has discretion to change its interpretation, as long as the construction that it eventually adopts is reasonable and the change in position is not undertaken in an arbitrary and capricious manner. "[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley* v. *Citibank, N.A.*, 517 U.S. 735, 742 (1996). In addition, respondents have made no claim that they legitimately relied on the agency's prior, narrower approach to successorship. *Ibid.*

no connection with those miners. The Commissioner properly recognized that the recurrence of the "orphan miner" problem that plagued the pre-1992 NBCWA system would be contrary to Congress's purpose, expressed in the Coal Act itself, to "identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to [coal industry] retirees." Energy Policy Act of 1992, Pub. L. No. 102-486, § 19142, 106 Stat. 3037. Accordingly, the Commissioner's determination that a direct successor in interest of a signatory operator that employed beneficiaries of the Combined Fund may be assigned responsibility for those beneficiaries when the signatory operator itself is defunct and no other related person may be found is reasonable and should be upheld.

* * * * *

For the foregoing reasons as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

SEPTEMBER 2001